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No. 08-

In the Supreme Court of the United States

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,

Petitioner,

v.

MICHELLE MONTEAGUDO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer is vicariously liable under Title VII for sexual harassment where the employer has implemented a concededly adequate anti-harassment policy with complaint procedure pursuant to this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and the plaintiff fails to take advantage of the policy because of an unsupported subjective belief that it would be futile or lead to retaliation.

CORPORATE DISCLOSURE STATEMENT

Petitioner Asociacion de Empleados del Estado Libre Asociado de Puerto Rico is a private non-profit entity composed of and owned by public employees. There is no parent or publicly-held company owning 10% or more of petitioner's stock.

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The Asociacion de Empleados del Estado Libre Asociado de Puerto Rico respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 554 F.3d 164 and is reproduced in the Appendix herein at 1a-25a. The decision of the U.S. District Court for the District of Puerto Rico is not officially reported but is available at 2007 WL 2245944 and is reproduced in the Appendix at 26a-32a.

JURISDICTION

The judgment of the court of appeals was issued on January 26, 2009. Pet. App. 1a. Petitioner's timely petition for rehearing and rehearing en banc was denied on February 20, 2009. Pet. App. 33a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a)(1), provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

This case concerns the continuing vitality of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those decisions, this Court struck a balance between imposing vicarious liability under Title VII and providing incentives for employers to avoid that liability by creating adequate internal anti-harassment and complaint policies. The Court first held that an employer is vicariously liable under Title VII for a supervisor's sexual harassment creating a hostile work environment. Where no tangible employment action is taken, however, the Court made clear that the employer has an affirmative defense if it shows (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," such as by implementing an anti-harassment policy with complaint procedure; and (2) that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer," such as by unreasonably failing to use such a complaint procedure. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. The decision

below interprets the second prong of that analysis to make the employee's use of a valid complaint procedure essentially voluntary, which has the effect of fundamentally reworking the balance the Court struck in *Ellerth* and *Faragher*.

In the present case, respondent alleged, and the jury found, that she was sexually harassed for several months by a supervisor who created a hostile work environment. Petitioner had instituted an anti-harassment policy and complaint procedure of which respondent was aware. The jury found that petitioner carried its burden under *Ellerth* and *Faragher* of exercising reasonable care to attempt to prevent and correct sexual harassment by adopting and disseminating this anti-harassment policy. Respondent nonetheless did not report the harassment to petitioner at any time during her employment; instead, she resigned and then brought this suit.

1. Respondent Michelle Monteagudo worked in 1999 and 2000 as a temporary employee at petitioner Asociacion de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA"). In October 2000, she became a permanent secretary in the Human Resources Department. At that time, she was provided a copy of petitioner's sexual harassment policy, for which she signed a receipt. Court of Appeals Appendix ("A") 938-39. Respondent acknowledged that she had a copy of the policy and knew "what the procedures that needed to be followed were." A-974. Petitioner's policy stated:

> An employee who feels he has been sexually harassed at work in any way, should present his complaint to the

> Human Resources Department. If the alleged harasser should be this person, or anyone related or close to him, then the complaint must be presented directly to the Association's Executive Director.

A-156.

Respondent's immediate supervisor in the Human Resources Department was Orlando Vargas, the Director of Human Resources. Juan Francisco Arce-Diaz ("Arce"), a payroll, fringe benefits, and compensation manager for whom respondent had worked as a temporary employee, also assigned her work. Respondent testified that Arce began harassing her in mid-2002. Arce would "stop by" her work station at least once a day and "touch [her] on the shoulder," and she would "throw his hand backwards so he'd leave [her] alone." A-962-63. He also invited her "constantly to go out together" with other co-workers. A-961. In November 2002, after several months of this behavior, respondent testified that Arce "pulled [her] towards him to try to kiss [her]" in the parking lot of a local bar and she pushed him away. A-956-57.[1] The next work day, "the attitude displayed towards [respondent] by Mr. Vargas and Mr. Arce" was "changed completely around." A-963-64. Respondent testified that she was given additional work and that when she complained to Vargas about the work, "he slammed the desk very hard and told me that if I filed a

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[1] Respondent testified that Vargas and a co-worker named Marilyn Del Valle Cruz witnessed the incident in the parking lot. They both testified that they never witnessed any inappropriate conduct. A-1034, 910.

complaint, the next day I would be dismissed." A-967. Respondent did not mention the alleged harassment in the parking lot (or any other harassment) in this complaint to Vargas.

The only witness besides respondent to testify to an incident of possible harassment was a fellow employee named Jose Francisco Figueroa-Cana ("Figueroa"). Figueroa testified that one time he saw Arce "place[] his hand on her . . . waist . . . [in] an undesirable action." Court of Appeals Supplemental Appendix ("SA") 10. Respondent told him "that was something that normally took place . . . that [Arce] would always try to seek a way so he could touch her." SA-12.

Figueroa also advised respondent on the procedures that she could follow to report Arce's alleged harassment. SA-15. Figueroa testified that "[he] told her to go through the channels as to the policies that AEELA refers to." SA-15. He later testified, however, that "[he] would tell her that [he] didn't know what [he] could recommend to her because of the type of person we were dealing with." SA-18. And he said the matter was "extremely difficult and quite delicate" because it involved Vargas and Arce. SA-19. Figueroa was a union delegate, but he did not alert the union to respondent's allegations of harassment for a variety of reasons: he did not represent her department, "for me it was extremely difficult to bring forth something like this dealing with who we dealt with," the union was "very weak," and the union president would not be helpful. SA-19-22. Notwithstanding Figueroa's equivocal advice to respondent, he testified that he had filed his own complaint with

Vargas relating to sexual harassment, and that petitioner had responded promptly and effectively. SA-23-28.

2. It is undisputed that respondent never told anyone in petitioner's management that she was sexually harassed. Petitioner's policy offered two options to report the alleged harassment: the Human Resources Department or petitioner's Executive Director (Pablo Crespo-Claudio ("Crespo")). Respondent testified that she did not report Arce's harassment to Vargas, the director of Human Resources, because Vargas and Arce were friends and had been out together at the bar where Arce allegedly tried to kiss respondent in the parking lot.[2]

With respect to Executive Director Crespo, respondent conceded that she had no reason to doubt his integrity. A-978. And respondent conceded that she had no knowledge of any past failure by Crespo to respond adequately to a harassment complaint. Indeed, respondent did not suggest that she had any reason to believe that, whether the complaint was made to the Human Resources Department or directly to the Executive Director, petitioner ever had failed to respond adequately to a harassment complaint.

Nonetheless, respondent testified that she did not report the harassment to Crespo because she believed the managers were all friends and would stick together rather than help a junior employee like her:

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[2] Nor did respondent report the alleged harassment to Vargas's supervisor, Blanca Medina de Grau, even though respondent "had no problems with her," A-1000, and Medina was not a friend of Arce's.

> Because the person I needed to complain with were all friends. Either it be the executive director or the human resources director, they're all friends amongst themselves. We're talking about some managerials versus an employee who virtually had started working a few days before.

A-976; *cf.* A-1003 (respondent's counsel stating that respondent's "sole reason" for believing Medina would protect Vargas and Arce was that all three "were managerials").

3. A week or two after the alleged incident in the parking lot, on December 5, 2002, respondent submitted a letter of resignation to Executive Director Crespo. Respondent's resignation letter did not report the alleged harassment. Far from it: the letter stated that respondent was "very grateful for the opportunity that you gave me to work for [petitioner], getting to know and fraternizing with other colleagues and of belonging to such an excellent team." A-154. At trial, respondent claimed that a friend drafted the letter. She testified that the letter was false but that she signed it because "if I were to need something from the Association later, I wanted the doors to be open." A-988.

4. A year after resigning, on December 23, 2003, respondent filed suit against petitioner in the U.S. District Court for the District of Puerto Rico, alleging sexual harassment under Title VII and the laws of Puerto Rico. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. 1331 and 1367(a). At the end of respondent's case, and again at the close of all the evidence, petitioner moved for

judgment as a matter of law under Fed. R. Civ. P. 50(a) on the ground that it had established the *Ellerth-Faragher* affirmative defense. The district court denied the motions and submitted the affirmative defense to the jury.

The jury found that respondent was subjected to sexual harassment in violation of Title VII and Puerto Rico's analogous laws. The jury found for petitioner on the first prong of the *Ellerth-Faragher* defense, but for respondent on the second prong. A-601. The jury awarded compensatory damages of $333,000 and punitive damages of $300,000. The court then apportioned $1 of the compensatory damages to the Title VII claim and $332,999 to the claim under Puerto Rico law, because the latter provides for doubling compensatory damages. The resulting award was $965,999 not including interest. A-621. Petitioner renewed its motion for judgment as a matter of law as to the second prong of *Ellerth* and *Faragher*, but the district court denied the motion. Pet. App. 26a-32a.[3]

5. The First Circuit affirmed. Since the "parties agree[d] that the sexual harassment policy AEELA had in place was sufficient for it to meet the first prong of the defense," the only issue was whether respondent's "reasons for failing to report Arce's conduct to her superiors was [*sic*] unreasonable." Pet. App. 12a-13a. The court stated that under circuit precedent, "'[t]here is no bright-line rule as to when a failure to file a complaint

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[3] The Puerto Rico Supreme Court subsequently imported the *Ellerth-Faragher* framework into local law. *See Albino Agosto v. Angel Martinez, Inc.*, 2007 WL 1828398, *8 & n.4 (P.R. June 4, 2007).

becomes unreasonable.'" Pet. App. at 12a (quoting *Reed v. MBNA*, 333 F.3d 27, 35 (1st Cir. 2003)). The court concluded that respondent was "understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas's relationship with Arce." Pet. App. 13a.

The court below found "more difficult" the question whether respondent's failure to report Arce to Crespo on the basis of their alleged friendship was unreasonable. Pet. App. 13a. The court of appeals noted that the "only evidence that [respondent] proffers for this friendship are conversations she overheard by Vargas and Arce and the fact that Crespo testified that he may have gone out with Arce for drinks." Pet. App. 13a. Nonetheless, the court cited other factors that it believed the jury could have taken into account, including Figueroa's advice to respondent that "the matter was 'extremely difficult and quite delicate' given the people involved," and the fact that "witnesses to the alleged harassment failed to report the sexual harassment as well." Pet. App. 13a. Although respondent had not testified that her age had anything to do with her decision not to make a complaint, the court below stated that respondent's "relative youth compared to Arce" also supported the reasonableness of her failure to report. Pet. App. 13a.

Moreover, although there was no evidence that petitioner ever had responded improperly or ineffectively to a harassment complaint, the First Circuit held that that did not matter. "Unlike other circuits," it explained, "we have not required . . . evidence demonstrating 'that the employer has ignored or resisted similar complaints or has taken

adverse action against employees in response to such complaints.'" Pet. App. 18a (quoting *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001)).[4] Nor did the court below point to any other objective basis to believe that a complaint would have been futile or provoked retaliation. Instead, the court simply invoked its prior caselaw stating that "juries are supposed to be good at detecting false claims and at evaluating reasonable behavior in human situations," Pet. App. 13a, and concluded that "[w]hile Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could conclude that her failure to report was based on 'more than ordinary fear or embarrassment' and was therefore reasonable." Pet. App. 14a.[5]

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[4] The court below noted this disagreement with other circuits in rejecting petitioner's challenge to the exclusion of evidence that petitioner had successfully taken corrective measures in cases where its anti-harassment policy had been used. Pet. App. 18a. The First Circuit not only held that respondent need not point to past instances where petitioner's policy had failed, but also found it irrelevant that petitioner's policy in fact had succeeded in other cases. The court's holding that it could be reasonable for respondent to forgo reporting without regard to the actual efficacy of petitioner's policy underscores the court's acceptance of purely subjective and unsupported reasons for not reporting.

[5] The finding that petitioner fulfilled its duty under the first prong of *Ellerth-Faragher* to act reasonably to prevent and correct harassment cannot be reconciled with the finding necessary to permit punitive damages, *i.e.*, that petitioner acted "with malicious or reckless indifference" to respondent's rights and did not make "good-faith efforts to comply with Title VII." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545-46 (1999). The court below held that petitioner had waived any challenge to the punitive damages and declined to set aside the award on plain-error review. Pet. App. 21a-25a.

6. On February 20, 2009, the First Circuit denied petitioner's petition for rehearing or rehearing *en banc*. Pet. App.33a.

REASONS FOR GRANTING THE WRIT

The decision below effectively eviscerates the careful balance this Court struck in *Ellerth* and *Faragher* and creates a clear circuit conflict on whether generalized fears of retaliation or futility without any objective support excuse a would-be plaintiff from the duty to report sexual harassment pursuant to an employer's adequate anti-harassment policy. Several courts of appeals have held, using various formulations that all conflict with the decision below, that a plaintiff must have concrete, objective reasons for not reporting.

The Second Circuit requires proof that "the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2001). While acknowledging that holding, the First Circuit expressly rejected it (going so far as to uphold the exclusion of evidence of past responsiveness). Pet. App. 18a. There is clearly no such objective evidence in this case.

The Fourth Circuit has held that an employee cannot assume that a complaint will be futile "merely because members of the management team happen to be friends." *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 268 (4th Cir. 2001). The court below, in contrast, held that respondent could forgo reporting because the person to whom the report should have been made (Executive Director

Crespo) may have socialized on occasion with the harasser along with other employees. *See* Pet. App. 13a.

The Eighth Circuit has held that fear of retaliation is not "generally a proper excuse for failing to report," because "[n]ormally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 933 (8th Cir. 2008). The court below, in contrast, in the absence of any objective basis to believe that retaliation was likely, accepted respondent's generalized, subjective fear of retaliation as a justification for failing to report.

The Eleventh Circuit has held that reporting is required except "in extreme cases." *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1306 (11th Cir. 2007). The court below, in contrast, held that reporting was not required in what is at most a typical case, with no facts that remotely can be termed "extreme."

In all these respects, the decision below conflicts with decisions of other circuits. Moreover, although the Third and Fifth Circuits have not addressed the issue as explicitly as the First Circuit, those courts appear to be aligned with the court below in adopting a decidedly more permissive attitude in allowing employees who bypass valid complaint procedures to prevail despite this Court's holding in *Ellerth* and *Faragher*.

The net effect of the decision below is to eviscerate the careful balance that this Court struck in *Ellerth* and *Faragher*. The availability of an affirmative defense was critical to the Court's

recognition of vicarious liability and to providing employers with the proper incentives to establish anti-harassment and complaint procedures. But those incentives will be diminished if the affirmative defense can be vitiated based on the thin showing accepted by the court below. Enforcement of the affirmative defense is important not merely to employer-defendants, but more fundamentally to the Court's carefully-crafted scheme to further Title VII's goal "to promote conciliation rather than litigation." *Ellerth*, 524 U.S. at 764. It is "at odds with the statutory policy" to impose vicarious liability on employers without giving employers "credit" for making "reasonable efforts to discharge their duty" by implementing anti-harassment policies. *Faragher*, 524 U.S. at 806.

When this Court imposed the reasonable-reporting duty, the Court understood that "the victim may well be reluctant to accept the risks of blowing the whistle on a superior." *Id.* at 803. But because "the cooperation of the victims" is necessary to expose and eliminate sexual harassment, *Walton v. Johnson & Johnson Svcs., Inc.*, 347 F.3d 1272, 1290 (11th Cir. 2003), and because it would be contrary to Congress' intent to impose automatic vicarious liability on employers, the Court required plaintiffs to act reasonably to report harassment despite the obvious reasons why many will be reluctant to do so. Most courts of appeals have recognized that excusing a failure to report based on nothing more than "subjective, ungrounded fears" would "completely undermine" the *Ellerth-Faragher* framework, *Pinkerton v. Colorado Dept. of Trans.*, __ F.3d __, 2009 WL 1014589, *8 (10th Cir. Apr. 16,

2009), and accordingly have insisted on concrete, objective reasons before a failure to report is excused. This Court should review and correct the First Circuit's contrary holding to restore uniformity and to vindicate the careful balance that the Court struck in *Ellerth* and *Faragher*.

I. The Circuits Are Divided On What Constitutes A Reasonable Justification For An Employee To Bypass A Valid Complaint Procedure

A. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis to Believe A Complaint Will Be Futile

1. Although their formulations of this rule have varied, a majority of the circuits require that there be concrete evidence of futility, beyond the victim's mere unsupported belief, to excuse a failure to follow the employer's complaint procedure. As the decision below acknowledges, the Second Circuit requires a showing that reporting has proved futile (or worse) in the past. Pet. App. 18a; *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001) (plaintiff must demonstrate "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints").

The Eighth and Ninth Circuits similarly have rejected efforts to bypass valid procedures absent actual evidence of futility. *See Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (unsupported belief in futility insufficient to excuse failure to report); *Holly D. v. Cal. Instit. of Tech.*, 339

F.3d 1158, 1179 n.24 (9th Cir. 2003) (same). The Sixth and Tenth Circuits have reached similar holdings in unpublished opinions. *See Anderson v. Wintco, Inc.*, __ Fed. Appx. __, 2009 WL 449169, *4 (10th Cir. Feb. 24, 2009); *Deters v. Rock-Tenn Co.*, 245 Fed. Appx. 516, 525-26 (6th Cir. 2007).

In short, the majority rule, as articulated by the Fourth Circuit, is that "[a]n employee's subjective belief in the futility of reporting a harasser's behavior is not a reasonable basis for failing to take advantage of any preventive or corrective opportunities provided by the employer." *Barrett*, 240 F.3d at 268. The decision below, in contrast, expressly holds that objective evidence of actual futility is not required (and it is clear that no such objective evidence exists in this case). By approving respondent's unsupported subjective belief in futility as a valid reason to forgo reporting, the First Circuit has departed sharply from the majority of the courts of appeals.

2. More specifically, other courts have held that alleged friendship between managers is not a sufficient basis to assume that reporting will be futile. If it were, the *Ellerth-Faragher* framework would essentially be unavailable whenever a supervisor contributed to the alleged harassment. In *Barrett*, the Fourth Circuit explained that excusing reporting because of management friendships would vitiate the affirmative defense:

> We cannot accept the argument that reporting sexual harassment is rendered futile merely because members of the management team happen to be friends. Crediting this

> view would impose an impermissible burden on any company, especially small businesses. . . . [Plaintiff] claims that these friendships should relieve an employee of her reporting obligation and effectively impose automatic liability on the employer. Automatic liability, however, is precisely what the Supreme Court sought to avoid in fashioning the *Faragher/Ellerth* affirmative defense.

240 F.3d at 268. The Sixth and Eighth Circuits likewise have held that friendship between managers is common and does not, as a matter of law, excuse a failure to report. *See Deters*, 245 Fed. Appx. at 525 (that managers are friends is insufficient reason not to complain); *Weger*, 500 F.3d at 724-25 (plaintiffs' belief that they would not receive fair investigation because of "close relationship" between harasser and investigator is "insufficient"); *see also Holly D.*, 339 F.3d at 1179 n.24 (allegation of "faculty bias" does not "support a reasonable belief that Caltech was so biased that resort to its procedures would have been futile").

This case does not involve any allegation of a close, personal relationship, but only a degree of "friendship" that is to be expected of management in all but the largest enterprises. While the court below relied primarily on respondent's testimony that Crespo and Arce were friends, Pet. App. 13a, there was no evidence that Crespo and Arce were close friends, or relatives, or otherwise had such a close personal relationship that respondent could presume that Crespo would protect Arce in violation

of petitioner's written policy (and of the law). To the contrary, the evidence of Crespo's "friendship" with Arce consisted solely of the assertion that Crespo may have gone out for drinks on occasion with Arce, as Crespo also did with others in the office. *See* A-800 ("Have you ever gone out for drinks with Mr. Arce? [Crespo:] Maybe so. I don't specifically recall that I have, but I might have done so."). This shows -- at most -- a run-of the-mill collegial relationship, and is patently insufficient to excuse a failure to report under the law of most circuits.

The court also suggested that Figueroa's advice that the matter was "extremely difficult and quite delicate" bolsters respondent's assumption of futility. Pet. App. 14a. But again, this conflicts with the law of other circuits. Vague notions that managers stick together and of friendship among managers do not become transformed into objective evidence of futility by being described by a co-worker. What Figueroa pointedly did *not* say was that he knew of any complaints that had been futile or had resulted in retaliation. And he did not tell respondent that making a report would be futile or advise her not to make a report. To the contrary, he first testified that he told her to follow petitioner's procedures, and then equivocated that he did not know what to recommend. *See* SA-15, 18. Even if a co-worker's advice could substitute for evidence of actual futility in some circumstances (for example, where a co-worker erroneously tells the plaintiff that past complaints have been futile and the plaintiff forgoes reporting because she reasonably and sincerely believes that erroneous advice), Figueroa's equivocal advice did not come close to justifying

respondent's assumption that reporting would be futile.[6]

B. In Conflict With The Decision Below, Most Circuits Require A Concrete, Objective Basis To Believe A Complaint Will Lead To Retaliation

1. A majority of the circuits hold that a generalized, unsupported fear of retaliation does not, as a matter of law, excuse a failure to report sexual harassment. As with an excuse based on futility, an excuse based on fear of retaliation must be founded on objective evidence, not subjective fears or skepticism. As the Eleventh Circuit has explained,

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[6] The court below also stated that the jury could consider "the fact that witnesses to the alleged harassment failed to report the sexual harassment as well." Pet. App. 14a. But the court did not explain how the alleged failure of Vargas and Del Valle to report the alleged parking lot incident bears upon respondent's reasonableness in failing to report to Executive Director Crespo, and it does not. First, whether other employees failed to report as required by petitioner's anti-harassment policy is beside the point, for the reasonable reporting duty imposed by this Court rests on the would-be plaintiff. Second, that Vargas (who allegedly was complicit in Arce's harassment) failed to report it cannot excuse respondent's failure to follow the other specific avenue provided by the policy -- *i.e.*, reporting the harassment to Crespo, who was not alleged to be in any way complicit in it and whose integrity respondent had no reason to question. *See supra* at 6; *see also Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413 (5th Cir. 2002) (where supervisor to whom employee initially reported later joined in harassment, employee's "reasonable (not to mention obvious) course of action would have been to report [original harasser's] and [supervisor's] conduct to one of those individuals with authority higher than [supervisor's]").

"subjective fears of reprisal may exist in every case, but those fears, standing alone, do not excuse an employee's failure to report a supervisor's harassment." *Walton*, 347 F.3d at 1291. Similarly, the Eighth Circuit has admonished that "[w]e do not believe that a fear of retaliation is generally a proper excuse for failing to report sexual harassment." *Adams*, 538 F.3d at 932; *see also Weger*, 500 F.3d at 725 (fear of retaliation must be "truly credible"). Other circuits likewise have emphasized that a certain degree of concern over the potential for retaliation is inherent in the employer complaint process that the Court sanctioned, so undifferentiated and unsupported subjective fears "do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Thornton v. Federal Express*, 530 F.3d 451, 457 (6th Cir. 2008) (internal quotation omitted); *accord Shaw v. Autozone*, 180 F.3d 806, 813 (7th Cir. 1999); *Pinkerton*, 2009 WL 1014589, *8.

The Fourth Circuit's decision in *Barrett* illustrates the majority rule requiring concrete, objective evidence that retaliation is likely before a failure to report is excused. The plaintiff there claimed that she feared retaliation because the company president and the harasser were "good friends." 240 F.3d at 267-68. But because there was no evidence that the company had "ever taken any adverse tangible employment action against complaining employees," the court held that the plaintiff's fear was merely "[a] generalized fear of retaliation" that could not excuse her failure to report. *Id.*

Similarly, in the decision that the court below expressly rejected, the Second Circuit held that evidence of actual retaliation against prior complainants was required:

> A credible fear [of retaliation] must be based on more than the employee's subjective belief. Evidence must be produced to the effect that the employer has ignored or resisted similar complaints or has taken adverse actions against employees in response to such complaints.

Leopold, 239 F.3d at 246.[7]

2. a. In conflict with these decisions, the First Circuit expressly acknowledged that it does not require concrete evidence to support an alleged fear of retaliation (or belief in futility):

> Unlike other circuits, we have not required that in order to overcome the second prong of the *Faragher-Ellerth* affirmative defense, plaintiffs must produce evidence demonstrating "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." *See, e.g., Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001).

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[7] *Cf. Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 59, 64-65 (2d Cir. 1998) (failure to report later harassment excused where plaintiff initially reported co-worker's harassment to supervisor and supervisor told her she was "crazy" and would lose her job if she complained).

Pet. App. 18a. Indeed, the First Circuit not only explicitly rejected the Second Circuit's holding in *Leopold*, but went so far as to uphold the exclusion of evidence concerning an instance in which the internal complaint procedures had proven successful. Pet. App. 18a. Accordingly, while in the Second Circuit evidence of past futility or retaliation is required, in the First Circuit evidence of success is not even relevant.

In approving a failure to report based on unsupported, subjective fear of retaliation, the decision below built on the foundation that the First Circuit had laid in *Reed v. MBNA Mrkg. Sys., Inc.*, 333 F.3d 27 (2003). *Reed* noted that other courts had "focused on whether the employee had concrete reason to apprehend that complaint would be useless or result in affirmative harm to the complainant." *Id.* at 35-36. But *Reed* did not adopt this standard. Instead of giving legal content to this Court's "reasonableness" requirement, *Reed* stated that "juries are supposed to be good at . . . evaluating reasonable behavior in human situations," and reversed summary judgment for the employer. *Id.* at 37. Indeed, *Reed* acknowledged that its holding "creates a loophole for false and overstated claims of threat by one hoping to reach a sympathetic jury." *Id.*[8]

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[8] Before the decision below, some courts had quoted other language in *Reed* in support of a standard similar to the majority rule requiring concrete, objective evidence. *See, e.g.*, *Weger*, 500 F.3d at 725. *Reed* suggested, for example, that "unless patently futile, concerns as to whether the complaint mechanism will fail can be tested by trying it out . . ." 333 F.3d at 36. Despite this language, *Reed*'s reversal of summary judgment for the employer meant that the plaintiff was *not*

b. The Third and Fifth Circuits appear to align with the First Circuit in declining to require objective evidence that a report of harassment would lead to retaliation. While these circuits have not addressed the issue as explicitly as the First Circuit, any requirement of an objective basis for a failure to report is conspicuous by its absence from their decisions, despite the substantial body of caselaw from other circuits adopting such a rule.

In *Cardenas v. Massey*, 269 F.3d 251, 267 (3d Cir. 2001), the Third Circuit held that whether an employee acted reasonably was a question for the jury where the employee waited four years to file a formal complaint "for fear of aggravating the situation or branding himself a troublemaker." There is no indication that the employer had retaliated against any prior complainants or of any other objective basis for the employee's fear that making a report would lead to adverse consequences. And rather than follow the Fourth and Seventh Circuits' decisions in *Barrett*, 240 F.3d at 267-68, and *Shaw*, 180 F.3d at 813, respectively, by requiring objective evidence, the Third Circuit focused on the employee's subjective belief.[9]

Similarly, in *Mota v. Univ. of Texas Houston Health Science Center*, 261 F.3d 512, 526 (5th Cir.

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required to test out the complaint mechanism or to present any objective support for her belief in futility or retaliation. *Id.* at 37. In any event, the decision below has resolved any ambiguity in *Reed*, and it now is plain that the First Circuit does not require the concrete, objective evidence required by most circuits.

[9] *Cardenas* involved national-origin harassment, but the court expressly adopted the *Faragher/Ellerth* framework in that analogous context. *See* 269 F.3d at 261 n.6.

2001), the Fifth Circuit held that a nine-month delay in reporting harassment was reasonable where the supervisor threatened retaliation and the plaintiff "may have believed [the complaint process] was "ineffectual, given [the supervisor's] influence at the University." As in *Cardenas*, there is no indication in *Mota* that the employee's fear of retaliation was objectively supported, and the court focused instead on the employee's subjective belief.[10]

C. In Conflict With The Decision Below, Other Circuits Do Not Excuse A Failure to Report Even When The Plaintiff Suffers Much More Severe Trauma

The decision below also creates a circuit split on the question whether a failure to report sexual harassment can be excused because the plaintiff is young or has been traumatized by the harassment.

The decision below holds that respondent's failure to report was reasonable in part because respondent may have been more traumatized by it given the "significant age differential" between respondent and Arce. Pet. App. 14a. In *Reed*, the First Circuit had held that trauma could be a

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[10] Some unpublished decisions arguably vary in their application of *Cardenas* and *Mota*, but as unpublished decisions they do not purport to change the law of the circuit. *See, e.g., Amati v. U.S. Steel Corp.*, 304 Fed. Appx. 131, 134 (3d Cir. 2008) (four-month delay in reporting unreasonable); *Harper v. City of Jackson Municipal School Dist.*, 149 Fed. Appx. 295, 302 (5th Cir. 2005) ("reasons for not complaining about harassment should be substantial and based upon objective evidence") (quotation omitted).

reasonable justification for failing to report where the plaintiff was a minor and had been sexually assaulted. *See* 333 F.3d at 37. By extending *Reed* to hold that respondent's "relative youth compared to Arce bears at least some relevance" even though respondent was not a minor (she was 22 and Arce 45) and did not suffer the kind of trauma associated with sexual assault, the decision below demonstrates the extent of the conflict among the circuits. Pet. App. 14a.

As to trauma, in contrast to the decision below, the Eleventh Circuit has rejected trauma as an excuse for failing to make a timely report despite the plaintiff's allegations that she was raped repeatedly and intimidated by being shown a gun. *See Walton*, 347 F.3d at 1290-91 & n.17. The court acknowledged that "severe harassment such as that which is alleged to have occurred here can be particularly traumatic," but it held that such trauma was insufficient as a matter of law to excuse the plaintiff's three-month delay in reporting. *Id.* at 1290. Without embracing this decision as correct, it does underscore the chasm between the approaches of the Eleventh and First Circuits.

As to age, there is similar tension between the decision below and a decision of the Seventh Circuit on the relevance of the plaintiff's "relative youth." In *Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir. 2006), the Seventh Circuit held that, in assessing whether sexual conduct constituted unwelcome harassment, courts should look to whether the plaintiff was below the local age of consent. That bright-line approach to the relevance of age makes sense. But the decision below -- by injecting age as a

mitigating factor in the case of someone well above the age of consent -- distracts attention from objective evidence that could justify a failure to use valid and available complaint mechanisms.[11]

II. The First Circuit's Approach Vitiates The Affirmative Defense That This Court Created In *Ellerth* and *Faragher*

As most circuits have recognized, subjective fears of retaliation or futility concerning the employer's internal complaint procedure can exist in every case. After all, in every case it is the employer that is allegedly responsible, at least at some remove, for the harassment, and the employer is certainly in a position to retaliate in that it will be overseeing the complaint procedure. If such fears, without more, rendered it "reasonable" not to report harassment, the affirmative defense that this Court created would be essentially useless -- not only in protecting employers from the automatic liability that this Court held improper, but more fundamentally in achieving the Court's goal of furthering Title VII's "primary objective" of "avoid[ing] harm." *Faragher*, 524 U.S. at 806. To be sure, the Court's "reasonableness" standard does not invariably require every victim to report harassment no matter what the circumstances. But by holding

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[11] Respondent did not testify that she failed to report because of youthful naivete or any alleged trauma. Any such suggestion would be contrary to respondent's testimony that she omitted any reference to the alleged harassment in her resignation letter because she wanted to keep her options open with petitioner. *See supra* at 7.

that a failure to report can be excused based on nothing more than the subjective, unsupported reasons offered by respondent, the First Circuit has vitiated the affirmative defense and the careful balance struck by this Court in *Ellerth* and *Faragher*.

A. Reporting Should Be Presumptively Required, And Failure To Report Should Be Excused Only For Objectively Supported Reasons

This Court fashioned the affirmative defense in order to avoid imposing automatic liability on employers -- which it held that Title VII could not support -- and because the affirmative defense would further Title VII's "basic policies of encouraging forethought by employers and saving action by objecting employees." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764. The Court also noted, that in crafting this scheme, it intended to provide an "incentive" or "credit" to employers who make reasonable efforts to discharge their duty. *Faragher*, 524 U.S. at 806. "To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purposes." *Ellerth*, 524 U.S. at 764. This Court recently reaffirmed that *Ellerth* and *Faragher* are intended to create "a strong inducement" for employers to implement anti-harassment policies "as a way to break the circuit of imputed liability." *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 129 S. Ct. 846, 852 (2009).

Because the obligations of the employer and employee function together to help prevent, discover, and remedy sexual harassment, enforcement of the employee's obligation to report sexual harassment is critical to the effective functioning of the entire scheme: "The genius of the *Faragher-Ellerth* plan is that the corresponding duties it places on employers and employees are designed to stop sexual harassment before it reaches the severe or pervasive stage . . . But that design works only if employees report harassment promptly." *Baldwin*, 480 F.3d at 1307. Just as it is important to provide robust protections against retaliation so employees are not deterred from reporting harassment, *See Crawford*, 129 S. Ct. at 852, it is equally important to ensure that employees have meaningful incentives to report harassment and are not lightly excused from utilizing valid employer procedures.

To give effect to the *Ellerth-Faragher* scheme, many circuits apply a strong presumption that a plaintiff must report harassment promptly (assuming that the employer has instituted an anti-harassment policy with complaint procedure). The Eleventh Circuit, for example, has held that the employee has the "obligation[] . . . to take full advantage of the employer's preventative measures" and that only "in extreme cases" could an employee's "reasons for not reporting harassment" be "good enough." *Baldwin*, 480 F.3d at 1306. The Eighth Circuit has stated that failure to complain "will *normally* suffice to satisfy the employer's burden under the second [prong]." *Adams*, 538 F.3d at 932 (emphasis added). And the Second Circuit has

expressed the inquiry in terms of a burden-shifting presumption:

> [O]nce an employer has satisfied its initial burden of demonstrating that an employee has completely failed to avail herself of the complaint procedure, the burden of production shifts to the employee to come forward with one or more reasons why the employee did not make use of the procedures. The employer may rely upon the absence or inadequacy of such a justification in carrying its ultimate burden of persuasion.

Leopold, 239 F.3d at 246.

Faragher and *Ellerth* did not specify particular circumstances that would or would not excuse a plaintiff's failure to report harassment. But several circuits have recognized that to excuse such a failure on the basis of speculative, unsupported reasons would eviscerate the affirmative defense that this Court took pains to fashion. As these courts have recognized, because "the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims," *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000) (citation omitted), plaintiffs should be excused from their obligation to report sexual harassment only for reasons that are objectively supported and that transcend the run of the mill.[12]

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[12] In the analogous context of exhaustion of union grievance procedures, it is well-settled that objective evidence is required before exhaustion is excused on grounds of futility. *See, e.g., Johnson v. District of Columbia*, 552 F.3d 806, 813 (D.C. Cir.

In particular, as the Eleventh Circuit has explained, subjective fears of retaliation may exist in every case, but this Court surely understood as much and did not go to the trouble of creating the affirmative defense intending that it be routinely defeated by unsupported speculation:

> Every employee could say . . . that she did not report the harassment earlier for fear of losing her job or damaging her career prospects. . . . [T]he Supreme Court undoubtedly realized as much when it designed the *Faragher-Ellerth* defense, but it nonetheless decided to require an employee to make the choice in favor of ending harassment if she wanted to impose vicarious liability on her employer. . . Were it otherwise, the *Faragher-Ellerth* defense would be largely optional with plaintiffs, and it would be essentially useless in furthering the important public policy of preventing sexual harassment.

Baldwin, 480 F.3d at 1307; *accord Pinkerton*, 2009 WL 1014589, *8 (excusing plaintiff's failure to report based on "subjective, ungrounded fears" would "completely undermine" *Faragher-Ellerth* framework). The Fourth Circuit similarly has explained that accepting "a speculative 'fear of

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2008) (requiring "a clear and positive showing of futility") (quotation omitted); *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989) (same; "[t]hat [plaintiff] subjectively may have thought such procedures were futile is insufficient").

retaliation' excuse for remaining silent . . . would undermine the primary objective of Title VII and could result in more, not less, sexual harassment going undetected." *Barrett*, 240 F.3d at 267. Insisting on concrete, objective evidence does not mean assuming that retaliation never occurs, but rather that "[n]ormally bringing a retaliation claim, rather than failing to report sexual harassment, is the appropriate response to the possibility of retaliation." *Adams*, 538 F.3d at 932-33 (citations omitted).

B. It Is Particularly Important For Plaintiffs To Fulfill Their Duty To Report Where, As Here, The Employer Has Fulfilled Its Duty Of Instituting A Proper Policy

This Court made clear that the duties of the employer and employee are complementary, operating together to achieve Title VII's goals. *See Faragher*, 524 U.S. at 764-65; *Ellerth*, 524 U.S. at 807. Where the employer has done its part, it is especially important for the employee to report harassment. That is true not only because the affirmative defense was designed to avoid automatic employer liability, but also because employers often will have no ability to "avoid[] harm" (*Faragher*, 524 U.S. at 806) caused by sexual harassment if the victim does not report it.

Moreover, the two prongs of the affirmative defense are related. Where an employer has put in place an adequate anti-harassment policy with complaint procedure, there should be less reason for the employee to believe that complaining will be

futile or lead to retaliation. The employer's fulfillment of its duty under the first prong thus heightens the employee's duty under the second prong: the more reasonably an employer has behaved in implementing an anti-harassment policy, the less reasonable it is for an employee to fail to take advantage of that policy. *Cf. McPherson v. City of Waukegan*, 379 F.3d 430, 442 (7th Cir. 2004) ("Since [plaintiff] does not dispute that the [employer] acted reasonably [under the first prong], the burden *was* on [plaintiff] to avail herself of these policies and procedures that she well knew were available to her.") (emphasis in original).

C. The First Circuit's Acceptance of Subjective, Unsupported Reasons For Failing To Report Vitiates The Affirmative Defense

Even before the decision below, the First Circuit had acknowledged that its interpretation of *Ellerth* and *Faragher* "creates a loophole for false and overstated claims of threat by one hoping to reach a sympathetic jury." *Reed*, 333 F.3d at 37. The decision below expands that loophole, essentially vitiates the careful balance struck by the Court in *Ellerth* and *Faragher*, and makes it crystal clear that the court below is in conflict with the circuits that have read *Ellerth* and *Faragher* to require that a plaintiff report sexual harassment absent a concrete, objective reason to forgo reporting. Those circuits have recognized that for the affirmative defense to play the important role for which this Court created it, the plaintiff's duty to report must be enforced, at least in ordinary cases.

The First Circuit, in contrast, has held that run-of-the-mill office camaraderie among managers entitles an employee to assume that reporting will be futile or provoke retaliation, even where there is no history of either and the employee concedes that she has no basis to question the integrity of the person to whom the report is supposed to be made.

If the view of the court below prevails, the affirmative defense will be "largely optional with plaintiffs, and . . . essentially useless in furthering the important public policy of preventing sexual harassment." *Baldwin*, 480 F.3d at 1307. Petitioner put in place a concededly adequate anti-harassment policy; petitioner was deprived of the opportunity to remedy the harassment of respondent because respondent chose for unsupported, subjective reasons not to report it; and petitioner nonetheless owes a very large judgment. An affirmative defense that is so easily evaded does not properly incentivize employers to put in place effective anti-harassment policies. *Cf. Crawford*, 129 S. Ct. at 852.

Nor does undermining the affirmative defense hurt employers alone. To the contrary, the Court fashioned the affirmative defense precisely because it recognized that all would benefit if the law encouraged "saving action" to prevent and stop sexual harassment, as opposed to litigation after it is too late. *See Faragher*, 524 U.S. at 807. All would agree that reporting sexual harassment may be difficult and unpleasant, *see, e.g.*, *Shaw*, 180 F.3d at 813, but that is why the Court created the affirmative defense in order to give victims the incentive to report and allow employers acting in good faith to address problems before they become

intractable. That is also why this Court in *Crawford* ensured that retaliation will not be excused based on technicalities. But neither should participation in valid complaint procedures be excused based on subjective fears. In neither case should the law encourage "prudent employees . . . to keep quiet about Title VII offenses." *Crawford*, 129 S. Ct. at 852.

Virtually all plaintiffs will be able to allege generalized concerns with futility or retaliation when it comes to reporting harassment by a supervisor to their employer. Moreover, it hardly can be exceptional for an anti-harassment policy to instruct that reports be made, as here, to someone in management, and it hardly is exceptional for the alleged harasser to be a supervisor rather than a low-level employee. Accordingly, if a victim could simply assume without evidence, as here, that management will stick together, then reports would be rare indeed. For these reasons, the decision below essentially vitiates the Court's work in *Ellerth* and *Faragher*. Apart from the need to resolve the circuit conflict, the Court should grant certiorari to ensure that the lower courts do not deprive its handiwork of meaning and effect. In order for the *Ellerth-Faragher* framework to accomplish its purpose, employees must be presumptively required to take advantage of reasonable employer policies, and reasons for failing to do so must be objectively supported and specific.

III. This Court's Guidance Is Needed, And This Case Is An Ideal Vehicle

A. Certiorari is warranted because the proper application of the *Ellerth-Faragher* affirmative defense is important both as a practical and policy matter. From a practical perspective, the issue is very frequently litigated. Employment discrimination cases represent more than 5% of all federal cases filed -- 13,375 cases in 2007 alone.[13] And the courts of appeals frequently address the *Ellerth-Faragher* defense: a Westlaw search for "(Ellerth Faragher) and 'affirmative defense'" returns 362 results for the courts of appeals. Moreover, the affirmative defense has been extended into contexts other than sexual harassment. *See, e.g., Williams v. Administrative Review Board*, 376 F.3d 471, 478 (5th Cir. 2004) (holding that *Ellerth-Faragher* is the appropriate standard for Energy Reorganization Act hostile-environment claim based on retaliation for whistleblowing, and noting that numerous other circuits have applied *Ellerth-Faragher* to racial harassment cases (citing cases from the 4th, 6th, 7th, 8th, and 10th circuits)); *Cardenas*, 269 F.3d at 261 n.6 (extending *Ellerth-Faragher* to national-origin harassment). And from a policy perspective, the goal that the Court sought to achieve in creating the defense -- preventing and stopping harassment -- remains vitally important, and undermining the defense imperils that goal. Title VII's "primary objective" remains "not to

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[13] *See* AOUSC Table 4.4 (U.S. District Courts: civil cases filed, by nature of suit) (2000-2007) ("Civil Rights: Employment").

provide redress but to avoid harm." *Faragher*, 524 U.S. at 805.

B. This Court adopted the reasonableness standard for the duties of employers and employees at a high level of generality, even while recognizing that clarity and predictability are important. *See Faragher*, 524 U.S. at 805. It is understandable that this Court announced the rule in general terms in the first instance. Now, however, the lower courts have been applying and refining the affirmative defense for 11 years in dozens, if not hundreds, of cases, and an explicit, acknowledged split has developed. This Court emphasized in *Faragher* itself the importance of avoiding "disparate" results and the resulting "temptation to litigate." 524 U.S. at 805. This Court has reaffirmed the importance of the *Ellerth-Faragher* framework, *see Crawford*, 129 S. Ct. at 852, but the Court has not provided substantive guidance about how that framework should be applied. The decision below highlights the need for this Court's intervention to provide clarity for the application of the affirmative defense that the Court crafted.

C. This case presents an ideal vehicle to consider the question presented and to clarify the proper interpretation of *Ellerth* and *Faragher*. A significant advantage of this case is that it cleanly presents the question of the proper standard for the second prong of the affirmative defense, because petitioner concededly satisfied the first prong. Moreover, the factual record is clear and straightforward in important respects. First, it is undisputed that respondent failed to report the alleged harassment in any manner at any time

during her employment, rather than (as in some of the reported cases) merely delaying a report or making a report in an ambiguous or ineffective manner.[14] Second, it is undisputed that there was no history of reports pursuant to petitioner's policy proving futile or provoking retaliation.[15] Third, the record is devoid of any other objective basis for respondent to believe that reporting Arce's harassment to Executive Director Crespo would be futile or lead to retaliation.

In short, this case is an ideal vehicle for the Court to ensure the effective functioning of the *Ellerth-Faragher* framework by clarifying the contours of an employee's "reasonable" obligation to report sexual harassment pursuant to an adequate anti-harassment policy. The Court should grant certiorari and hold that failing to report sexual harassment based on nothing more than a generalized fear of retaliation or belief in futility, without objective support, is unreasonable.

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[14] *See, e.g., Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1188 (9th Cir. 2005) ("when Hardage finally made his complaint he specifically asked the company not to investigate it"); *Madray*, 208 F.3d at 1302. Respondent's complete failure to report is "precisely the manner" in which "a victim of sexual harassment should *not* act in order to win recovery under [*Ellerth-Faragher*]." *Shaw*, 180 F.3d at 813 (emphasis in original).

[15] To the contrary, the only evidence admitted on the policy's application in other cases was Figueroa's testimony that he had used the complaint process and petitioner had responded promptly and effectively. SA-23-28.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 2009

APPENDIX

United States Court of Appeals
For the First Circuit

No. 07-2341

MICHELLE MONTEAGUDO,

Plaintiff, Appellee,

v.

ASOCIACIÓN DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Gustavo A. Gelpí, U.S. District Judge]

Before

Torruella, Baldock,* and Howard,
Circuit Judges.

Jorge Martínez-Luciano, with whom Carmen Edith Torres-Rodríguez and Law Offices of Pedro Ortiz-Álvarez, PSC, were on brief for appellant.

Juan Rafael González-Muñoz, with whom González Muñoz Law Offices, P.S.C., María E. Margarida-Franco, Margarida Franco Law Office, and Carlos M. Vergne Law Offices, were on brief for appellee.

January 26, 2009

* Of the Tenth Circuit, sitting by designation.

TORRUELLA, Circuit Judge. Michelle Monteagudo brought suit alleging sexual harassment claims under federal and Puerto Rico law against her former employer, Asociación de Empleados del Estado Libre Asociado de Puerto Rico ("AEELA"),[1] in the United States District Court for the District of Puerto Rico. On June 1, 2007, a jury found that Monteagudo was subjected to sexual harassment in violation of Title VII of the Civil Rights Act and Puerto Rico Laws 17, 69, and 100, and awarded her compensatory and punitive damages. AEELA moved for judgment as a matter of law on the Faragher-Ellerth affirmative defense pursuant to Federal Rule of Civil Procedure 50 and also moved for a new trial and remittitur of the damages award pursuant to Federal Rule of Civil Procedure 59. AEELA appeals the district court's denial of both these motions as well as certain evidentiary and discovery rulings made during trial. After careful consideration, we affirm.

I. Background

A. Monteagudo's Experience at AEELA

Monteagudo started working at AEELA in 1999 as a secretary in the Human Resources department. At that time, she was a non-permanent employee, substituting for the permanent secretary who was out on maternity leave. Monteagudo was supervised by Juan Francisco Arce-Díaz ("Arce"), a payroll, fringe benefits, and compensation manager for AEELA. At trial, Monteagudo testified that during her time as a substitute, Arce "would look at

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[1] AEELA is a non-profit savings and loans organization.

[her] as if he was appraising [her]." However, she "didn't give it much importance" because she did not view Arce's conduct to be that serious.

Monteagudo testified that Arce's conduct continued until Arce's permanent secretary returned from maternity leave, at which point Monteagudo stopped working in the Human Resources department. On October 2, 2000, after stints in AEELA's legal collections and legal affairs divisions, Monteagudo returned to the Human Resources department as a permanent employee. Once there, Monteagudo claimed that Arce engaged in inappropriate conduct towards her. For example, she remarked that Arce would come to her work station at least once a day where "he would stop and touch [her] on the shoulder." Monteagudo stated that she resisted Arce's advances by "throw[ing] his hand backwards so he'd leave [her] alone." She also complained that Arce would "invit[e] [her] constantly to go out together" with co-workers on double dates.

Monteagudo testified to the unpleasantness she felt as a result of Arce's conduct: "How can I feel except bad? They were treating me like a piece of meat. I wouldn't like to go to work . . . I didn't like to go into the office, because I knew what I would be involved and engaged in every day there."

On one such day, José Francisco Figueroa-Cana ("Figueroa"), a messenger for AEELA since 1996, witnessed Arce "plac[ing] his hand on [Monteagudo's] hip" in "an undesirable action." When he discussed this incident with Monteagudo, she told him that "that was something that normally took place . . . that [Arce] would always try to seek a

way so he could touch her." Figueroa testified that he was uncertain about what recourse Monteagudo should take because this was a matter that was "extremely difficult and quite delicate" given the people involved. Even though Figueroa was a union delegate, he decided against bringing the matter up to the union president because "it was extremely difficult to bring forth something like this dealing with who we dealt with," the union was a "very weak institution within AEELA," and because the union president had a "friendly relationship" with Orlando Vargas-López ("Vargas"), AEELA's Director of Human Resources and Labor Relations.

Monteagudo, perhaps partly as a result of her conversation with Figueroa, did not report Arce's conduct to her superiors as required by AEELA's sexual harassment policy.[2] This policy was in effect and distributed to Monteagudo while she was a permanent employee. At trial, Monteagudo explained that she did not report the sexual harassment "[b]ecause the person I needed to complain with were all friends." She added: "Either it be the executive director or the human resources

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[2] Two provisions of AEELA's sexual harassment policy are relevant to this appeal. Section 3.2 of the policy states: "An employee who feels he has been sexually harassed at work in any way, should present his complaint to the Human Resources Department. If the alleged harasser should be this person, or anyone related or close to him, then the complaint must be presented directly to the Association's Executive Director." Section 3.3 of the policy states: "It is the responsibility of any employee who witnesses a sexual harassment act, or if any other employee has complained of being a victim of sexual harassment, to immediately inform the appropriate official."

director, they're all friends amongst themselves. We're talking about some managerials [sic] versus an employee who virtually had started working a few days before." She claimed that the Executive Director, Pablo Crespo-Claudio ("Crespo"), was friends with Vargas and Arce "[b]ecause of conversations held by Orlando Vargas and Francisco Arce themselves," noting that "I tend to understand that if some people go out together to drink liquor, they're friends who go out to be together." Crespo admitted in his testimony that he may have gone out for drinks with Vargas and Arce.

Monteagudo testified that Arce's inappropriate behavior towards her continued for several months leading up to an incident during a group outing to a local bar, where in the parking lot, Arce "pulled [her] towards him to try to kiss [her]." Monteagudo pushed him away that evening, but testified that when she returned to work the following Monday after the incident "the attitude displayed towards [her] by Mr. Vargas and Mr. Arce" was "different" and that the additional work given to her was excessive. Also, when she complained to Vargas that she was performing two positions simultaneously, in addition to assisting colleagues from other divisions, Vargas "slammed the desk very hard and told [her] that if [she] filed a complaint, the next day [she] would be dismissed."

At trial, Monteagudo described her work conditions as intolerable due to the fact that her superiors did not permit "anyone at all to stop over to talk to [her], even to just say good morning." Further, she explained the emotional toll AEELA's actions took on her: "[E]very evening I'd be crying, I

would leave work crying, because there was a constant scolding for everything, everything I did was wrong. Everything." Thus, Monteagudo stated that she was left with no choice but to resign, resulting in what the jury later found to be a constructive discharge: "Obviously, if somebody is putting so much pressure on you and threatening to kick you out if you complain before the union, obviously that person doesn't want to have you there anymore. And that's why I resigned."

B. AEELA's Motions

At the end of Monteagudo's presentation of her argument, AEELA orally moved for judgment as a matter of law under Rule 50 stating the following: "At this time we want to move for judgment as a matter of law, not on the merits of the case, which are obviously subject to credibility issues for the jury, but on the subject of [the] affirmative defense limited by the Supreme Court in the case of Ellerth and Faragher regarding vicarious liability by an employer." AEELA noted that its motion was based on this "single discrete issue." The district court denied AEELA's motion. At the close of all evidence and before the case went to the jury, AEELA renewed its motion under "the Faragher issue" stating that "[p]retty much in our case in chief, nothing further was added, as far as factually towards this defense. It would be the same arguments of law and fact, but we need to raise it to preserve it." The district court again denied AEELA's motion.

On June 1, 2007, the jury found Monteagudo was subjected to sexual harassment in violation of

Title VII and Puerto Rico Laws 17, 69, and 100,[3] and awarded her compensatory and punitive damages.[4] On June 15, 2007, AEELA again filed a motion for

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[3] Law 17 prohibits sexual harassment in employment. 29 P.R. Laws Ann. § 155. Law 69 prohibits employment discrimination on account of gender. 29 P.R. Laws Ann. § 1321. Law 100 is analogous to Title VII and prohibits discrimination on the basis of age, race, color, sex, social or national origin, social condition, political affiliation, political or religious ideology. 29 P.R. Laws Ann. § 146.

[4] The jury found by a preponderance of evidence that (1) "[Monteagudo] was constructively discharged from her employment at AEELA specifically as a consequence of sexual harassment; (2) "AEELA approved an anti-sexual harassment policy which provided the procedure for employees to channel their claims and that the policy was disseminated among the employees"; (3) Monteagudo was not unreasonable in her "fail[ure] to use the procedure provided in the anti-sexual harassment policy in effect at AEELA; and that (4) "she was subjected to a sexually hostile work environment in violation of Puerto Rico law."

The jury also found that the amount of compensatory damages that "Monteagudo suffered as a proximate result of the sexually hostile work environment to which she was subjected by AEELA" totaled $333,000 and that Monteagudo should be awarded $300,000 in punitive damages.

On the same day, the district court entered an order modifying the judgment because the jury did not apportion the compensatory damage award between the Puerto Rico and federal Title VII claims. Accordingly, the district court ruled that it "allocates $1 of the compensatory damages to the Title VII claim and the remaining $332,999.00 to the Commonwealth claims" and "[p]ursuant to the damages provisions of Puerto Rico Laws 17, 69, and 100, the court will double the compensatory damages under the Commonwealth claims." As a result, Monteagudo's total award was $965,999.

judgment as a matter of law on the basis that Monteagudo was not subjected to a "severe or pervasive" hostile work environment and that AEELA met the burden of proof required in the Faragher-Ellerth defense. AEELA argued that no reasonable jury could find that Monteagudo's failure to use the procedures specified by AEELA's sexual harassment policy was reasonable. AEELA also moved for a new trial and for remittitur of the damages award.

The district court denied AEELA's motion for judgment as a matter of law, noting first that AEELA did not object to the court's instruction on the Faragher-Ellerth defense. The district court then offered the following reasons for its denial of AEELA's motion:

> At trial, Plaintiff testified that her supervisor, Arce, sexually harassed her by repeatedly touching her on the shoulders, asking her out, and one occasion trying to kiss her. She also testified that Vargas, Defendant's Human Resources Director, was aware of Arce's unlawful behavior and was an active participant in the harassment. Vargas, on another occasion, had threatened to fire Plaintiff if she complained about excessive workload. Finally, Plaintiff testified that Pablo Crespo, Defendant's Executive Director, was friends with Arce and Vargas. Plaintiff's testimony was bolstered by Figueroa Cana, another of Defendant's

> employee [sic], who said during trial that he had told Plaintiff that she did not have a real opportunity of obtaining relief because of the high ranking officers involved in the harassment and cover up. In light of the above, the court cannot conclude that no reasonable jury could have found that Plaintiff acted reasonably when she failed to follow Defendant's anti-sexual harassment policy.

In a separate order, the district court denied AEELA's motion for a new trial on damages noting that "the verdict of $965,999.00 is in part the result of Puerto Rico Laws 17, 69, and 100, which double the plaintiff's compensation." AEELA appeals the district court's ruling on these two motions as well as certain discovery and evidentiary rulings at trial.

II. Discussion

C. AEELA's Motion for Judgment as a Matter of Law

1. Standard of Review

Our review of a denial of a motion for judgment as a matter of law under Fed. R. Civ. P. 50 is de novo, "viewing the evidence in the light most favorable to the nonmoving party." Marcano Rivera v. Turabo Med. Ctr. P'ship, 415 F.3d 162, 167 (1st Cir. 2005) (quoting Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir. 2004)). We note that "[a] party seeking to overturn a jury verdict faces an uphill battle," id., and that our "review is weighted toward preservation of the jury verdict . . . ." Crowe v. Bolduc, 334 F.3d 124, 134 (1st Cir. 2003). "Courts

may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Marcano Rivera, 415 F.3d at 167 (quoting Rivera Castillo v. Autokirey, Inc., 379 F.3d 4, 9 (1st Cir. 2004)).

Here, although AEELA makes several claims on appeal of the denial of its Rule 50 motion,[5] we consider preserved only its claim regarding the Faragher-Ellerth affirmative defense. As we recently reasoned:

> A motion under Fed. R. Civ. P. 50(a) must "specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). The motion "must be sufficiently specific so as to apprise the district court of the grounds relied on in support of the motion." Zachar v. Lee, 363 F.3d 70, 73 (1st Cir. 2004) (citing Correa v. Hosp. San Francisco, 69 F.3d 1184, 1196 (1st Cir. 1995)). Such a motion "preserves for review only those grounds specified at the time, and no others." Id. (quoting Correa, 69 F.3d at 1196) . . . But, "[a]s the name implies, a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) is bounded by the

[5] Although raised in an inartful manner on appeal, we consider infra AEELA's challenges to the district court's rulings on certain evidentiary and discovery issues at trial.

> movant's earlier Rule 50(a) motion." Correa, 69 F.3d at 1196. "The movant cannot use such a motion as a vehicle to introduce a legal theory not distinctly articulated in its close-of-evidence motion for a directed verdict." Id.

Parker v. Gerrish, 547 F.3d 1, 12 (1st Cir. 2008). AEELA stated that it wished to preserve only one issue in its Rule 50(a) motion; thus, the only issue that we consider pursuant to its renewed motion is whether AEELA is entitled to the Faragher-Ellerth defense.

2. AEELA's Affirmative Defense

We have explained the Faragher-Ellerth defense as following:

> Under Title VII, an employer is subject to vicarious liability for sexual harassment by an employee's supervisor which does not constitute a tangible employment action. But the employer may prevail if it demonstrates a two-part affirmative defense: that its own actions to prevent and correct harassment were reasonable and that the employee's actions in seeking to avoid harm were not reasonable.

Chaloult v. Interstate Brands Corp., 540 F.3d 64, 66 (1st Cir. 2008) (citing Faragher v. City of Boca

Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998)).[6]

The parties agree that the sexual harassment policy AEELA had in place was sufficient for it to meet the first prong of the defense. See Arrieta-Colón v. Wal-Mart P.R., Inc., 434 F.3d 75, 86 (1st Cir. 2006) ("As to the first element of the defense, proof of an anti-harassment policy with a complaint procedure available to employees, while not necessarily dispositive, is relevant."); Marrero v. Goya of Puerto Rico, Inc., 304 F.3d 7, 21 (1st Cir. 2002) ("[T]he availability of the affirmative defense often will turn on whether the employer had established and disseminated an anti-discrimination policy, complete with a known complaint procedure."). Thus, Monteagudo concedes "that the only matter for consideration under the [Faragher-Ellerth] defense is the second prong of the defense."

Regarding the second prong, in Reed v. MBNA Marketing Systems, Inc., we remarked that while "[t]here is no bright-line rule as to when a failure to file a complaint becomes unreasonable . . . more than ordinary fear or embarrassment is needed." 333 F.3d 27, 35 (1st Cir. 2003). As set forth above, AEELA's sexual harassment policy states that an employee who is a victim of sexual harassment should first present her complaint to the Human

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[6] In the motion for judgment as a matter of law below there was some dispute among the parties as to whether a constructive discharge constitutes a "tangible employment action" for the purposes of the Faragher-Ellerth defense. However, the district court did not address this issue in its opinion and Monteagudo does not raise this issue here.

Resources department, unless the alleged harasser is within or close to someone within the department. If this is the case, as it is here given our facts, the employee is required to report the sexual harassment to AEELA's Executive Director. Thus, we must determine whether a jury could conclude that Monteagudo's reasons for failing to report Arce's conduct to her superiors was unreasonable.

From our review of the record, Monteagudo presented several reasons for not reporting the sexual harassment to Vargas. Vargas admitted that he was friends with Arce. Monteagudo also testified that Vargas and Arce would often go out drinking together. Monteagudo was thus understandably reluctant to report Arce's behavior to Vargas because of the closeness of Vargas's relationship with Arce.

The more difficult question, however, is whether Monteagudo's failure to report Arce's conduct to Crespo was unreasonable on the basis of Crespo's alleged friendship with Arce and Vargas. The only evidence that Monteagudo proffers for this friendship are conversations she overheard by Vargas and Arce and the fact that Crespo testified that he may have gone out with Arce for drinks. Admittedly, Monteagudo did not establish Crespo's relationship with Arce as clearly as she established Vargas's relationship with Arce; however, as we acknowledged in Reed, "juries are supposed to be good at detecting false claims and at evaluating reasonable behavior in human situations." Id. at 37.

Further, other factors that the jury could have taken into account in deciding that it was reasonable for Monteagudo not to report to her superiors

included Figueroa's advice to her that the matter was "extremely difficult and quite delicate" given the people involved, and the fact that witnesses to the alleged harassment failed to report the sexual harassment as well.[7] In addition, there was a significant age differential between Monteagudo, 22, and Arce, 45, when the harassment occurred. Although Monteagudo was not a minor as was the plaintiff in Reed, her relative youth compared to Arce bears at least some relevance. See id. (noting that a jury could consider the trauma inflicted by a supervisor who was more than double the age of a seventeen year old whom the supervisor was alleged to have assaulted). While Monteagudo's evidence is not overwhelming, we believe that a reasonable jury could conclude that her failure to report was based on "more than ordinary fear or embarrassment" and was therefore reasonable.[8]

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[7] Monteagudo testified that Vargas and her colleague, Marilyn Del Valle-Cruz ("Del Valle"), were aware of the sexual harassment. Although Vargas and Del Valle deny knowledge of the sexual harassment, the jury was entitled to believe Monteagudo's version given the facts surrounding the case.

[8] AEELA also maintains that a jury could not reasonably conclude that Monteagudo's failure to file a complaint with her union pursuant to the collective bargaining agreement was reasonable. We disagree. Monteagudo was advised by Figueroa, a union delegate, that filing a complaint would be futile because the matter involved people that made it "extremely difficult and quite delicate"; that the union was weak; and that the union president was friendly with Vargas. Furthermore, Monteagudo stated that the union was unresponsive to a prior complaint she had filed on an unrelated matter.

D. AEELA's Evidentiary Claim

1. Standard of Review

We review a trial court's decision to admit or exclude evidence for abuse of discretion. McDonough v. City of Quincy, 452 F.3d 8, 19 (1st Cir. 2006). "A district court has broad discretion to make relevancy determinations . . . ." Richards v. Relentless, Inc., 341 F.3d 35, 49 (1st Cir. 2003). Erroneous evidentiary rulings are harmless "if it is highly probable that the error did not affect the outcome of the case." McDonough, 452 F.3d at 19-20.

2. The Challenged Testimony

AEELA argues that the district court erred in disallowing testimony from Blanca Medina, AEELA's Director of Administrative and Legal

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We note here AEELA's claim that Monteagudo did not produce a copy of this prior complaint during discovery, even though AEELA had requested it. AEELA contends that the district court erred by disallowing AEELA to pursue a line of questioning "directed towards discrediting Monteagudo's testimony about supposedly having filed the grievance at issue." Further, AEELA asserts that the district court erred by stating that AEELA had not previously moved to compel the document. We agree with the district court that this was a discovery issue that AEELA should have addressed earlier either by way of a motion to compel or a request for sanctions under Fed. R. Civ. P. 37(c). However, even if we were to decide otherwise, any error would be harmless as the jury could have concluded that Monteagudo was reasonable in her decision not to file a complaint with the union based on the other reasons articulated above. In any event, we are hard pressed to see how AEELA was disadvantaged as the district court allowed AEELA to ask Monteagudo a series of questions about the document and its whereabouts for purposes of impeachment.

Affairs, regarding whether AEELA had successfully employed a corrective measure in 2005 pursuant to the sexual harassment policy. Monteagudo had objected to this testimony, stating that Medina's testimony on this issue was not "pertinent at this time." Upon Monteagudo's objection, the parties approached the bench and a colloquy ensued between the parties and the district court.[9] This

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[9] The transcript of the bench conference reads as follows:

> The Court: I think I should instruct the jury -- she already gave that answer. I should instruct the jury that the fact that in 2005 corrective measures were taken is not evidence of what happened in this case.
>
> Mr. Martínez-Luciano [AEELA's counsel]: The reason why I'm asking about this is because part of plaintiff's theory as stated today in opening statements . . . [is] that the proceedings in AEELA are not worth following, that they're not effective.
>
> Mr. González-Muñoz [Monteagudo's counsel]: No. What I said during opening statement was that it was not followed in Michelle's case, and limited myself to this case. It's not that [AEELA's harassment policy] is ineffective. In this case it was not followed. That's what I said in opening statements.
> Mr. Martínez-Luciano: It's not a theory you're going to pursue in closing arguments?
>
> Mr. González-Muñoz: No, no. I'm here for Michelle's case.
>
> The Court: I'm not going to strike the testimony at this time. Careful with the question. Whatever she stated in 2005 is not

exchange resulted in the apparent agreement by AEELA to the following instruction given to the jury immediately after the bench conference:

> The witness stated that in 2005, certain procedures were followed in another case. We're not going to go into that line of questioning. And so that what she was saying, we're not going to continue further, but let me instruct the jury that the fact that certain procedures may have been followed in 2005, they're not conclusive, they're not probative of whatever may have happened in 2002. So in that effect, in that regard, you're not to consider that statement as probative one way or the other of what may have happened in 2002.

From this exchange, it is not clear whether AEELA preserved its opposition to the court's evidentiary ruling because AEELA consented to the court's decision to give a jury instruction.[10] Assuming that AEELA has preserved the issue for

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> probative of what may have happened or not happened in 2002.
>
> Mr. Martínez-Luciano: Okay.

[10] At closing argument Monteagudo's counsel stated that AEELA's sexual harassment policy "had been proven defective." Upon AEELA's objection, the court directed Monteagudo's counsel to correct himself by explaining to the jury that any argument regarding the application of the policy's effectiveness pertains to Monteagudo only.

appeal, however, the district court did not err by excluding the testimony on relevance grounds. Unlike other circuits, we have not required that in order to overcome the second prong of the Faragher-Ellerth affirmative defense, plaintiffs must produce evidence demonstrating "that the employer has ignored or resisted similar complaints or has taken adverse action against employees in response to such complaints." See, e.g., Leopold v. Baccarat, Inc., 239 F.3d 243, 246 (2d Cir. 2001). Here, since Monteagudo limited her argument to the application of AEELA's policy to her case, the district court was within its discretion to exclude as not relevant AEELA's attempt to show that it had taken corrective measures pursuant to the policy in 2005.

E. AEELA's Motion for New Trial and Remittitur of Damages

1. Standard of Review

AEELA also appeals the district court's denial of its motion for new trial or remittitur under Fed. R. Civ. P. 59. "'A district court should only grant such motions if the outcome is against the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice.'" Marcano Rivera, 415 F.3d at 171 (quoting Johnson v. Spencer Press of Me., Inc., 364 F.3d 368, 375 (1st Cir. 2004)). We review for abuse of discretion. Id.

2. Damages

a. Compensatory Damages

"'[A] party seeking remittitur bears a heavy burden of showing that an award is grossly excessive, inordinate, shocking to the conscience of

the court, or so high that it would be a denial of justice to permit it to stand.'" Id. at 173 (alteration in original) (quoting Currier v. United Techs. Corp., 393 F.3d 246, 256 (1st Cir. 2004)). "[T]he Supreme Court of Puerto Rico has indicated that it 'will not intervene in the decision on the estimation of damages issued by the lower courts, unless the amounts granted are ridiculously low or exaggeratedly high.'" Id. at 172 (quoting Nieves Cruz v. Universidad de Puerto Rico, 151 P.R. Dec. 150 (2000) (certified translation)). Thus, "Puerto Rico's 'exaggeratedly high' standard echoes the federal 'grossly excessive' standard." Id. We stress that "only infrequently -- and then, for compelling reasons -- will we, from the vantage point of an algid appellate record, override the jury's judgment as to the appropriate amount of non-economic damages to which a plaintiff is entitled." Casillas-Díaz v. Palau, 463 F.3d 77, 82-83 (1st Cir. 2006).

Here, the jury awarded Monteagudo $333,000 in compensatory damages without apportioning the award between the Puerto Rico and the Title VII claims. The jury also awarded Monteagudo $300,000 in punitive damages under Title VII. Upon Monteagudo's motion, the district court issued an order allocating $1 of the compensatory damages award to the Title VII claims and the remaining $332,999 to the claims under Puerto Rico laws 17, 69, and 100.[11] The district court then doubled the

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[11] "In this circuit, punitive damages may not be awarded under Title VII without the award of at least nominal compensatory damages." Rodríguez-Torres v. Caribbean Form Mfr., Inc., 399 F.3d 52, 65 (1st Cir. 2005).

amount awarded pursuant to the Puerto Rico claims as required by Puerto Rico law, resulting in a total award amount of $965,999. See P.R. Laws Ann. tit. 29, § 155j(1); P.R. Laws Ann. tit. 29, § 146(a)(1); P.R. Laws Ann. tit. 29, § 1341(a)(1).

With respect to compensatory damages, we hold that the jury's award here of $333,000 was neither "grossly excessive" to "shock the conscience" of this court, nor was it "exaggeratedly high." Admittedly the jury was generous in awarding this amount; however, the district court did not abuse its discretion in deciding that the award was proportionate to harm suffered by Monteagudo. As we expressed above, as a result of the sexual harassment she endured for several months, Monteagudo felt "like a piece of meat" and wept every evening. After her constructive discharge, she testified that she suffered from depression and an inability to sleep. We note that a "verdict approved by both the jurors and the trial judge will be pared 'only if it is shown to exceed any rational appraisal or estimate of the damages that could be based upon the evidence before the jury.'" Casillas-Díaz, 463 F.3d at 83 (quoting Dopp v. Pritzker, 38 F.3d 1239, 1249 (1st Cir. 1994)). Given our facts and the highly deferential standard we must apply, this is not such a case. Moreover, the jury award here is commensurate with non-economic compensatory damage awards we have upheld in other Title VII and employment discrimination contexts.[12]

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[12] See McDonough, 452 F.3d at 22 (upholding $300,000 compensatory damages award where "bulk of the award" was for emotional distress in the form of humiliation, damage to reputation, and strained family relations); Valentín-Almeyda v.

b. Punitive Damages

We review a preserved challenge to a punitive damages award de novo. Acevedo-García v. Monroig, 351 F.3d 547, 566 (1st Cir. 2003). Where a challenge to a punitive damages award is not preserved, as is the case here, we review for plain error. Rodríguez-Torres, 399 F.3d at 64; Chestnut v. City of Lowell,

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Municipality of Aguadilla, 447 F.3d 85, 103 (1st Cir. 2006) (upholding compensatory damages award of $705,000 on the basis of harassment and threat of reprisals where plaintiff suffered emotional damages and mental anguish such as insomnia, anxiety, guilt, and depression as well as serious economic damages); Rodríguez-Torres, 399 F.3d at 64 (upholding on plain error review emotional distress damages of $250,000 in case involving claims under Title VII, Law 69, and Law 100 where Plaintiff "experienced financial difficulties, her marriage suffered, she entered a deep depression which lasted 'for quite some time,' and, because of the depression, she had difficulty finding subsequent employment"); Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 36-37 (1st Cir. 2003) (upholding $125,000 compensatory damages award for emotional distress including stress and anxiety disorders and irritable bowel syndrome); Kerr-Selegas v. American Airlines, Inc., 69 F.3d 1205, 1214 (1st Cir. 1995) (upholding $300,000 compensatory damage award on Title VII retaliation claim before doubling of award under Puerto Rico law); see also Muñiz-Olivari v. Stiefel Labs., Inc., 496 F.3d 29, 40-41 (1st Cir. 2007) (analogizing to Title VII law and holding that pain and suffering damages of $100,000 to husband and wife each was not excessive); cf. Soto-Lebrón v. Fed. Express Corp., 538 F.3d 45, 70 (1st Cir. 2008) (holding that $1,800,000 emotional damages award on libel claim was excessive in part because "there is an identifiable legal error that is at the heart of the jury's inflated award"); Koster v. Trans World Airlines, 181 F.3d 24, 35-36 (1st Cir. 1999) (holding emotional damage award of $716,000 as excessive and reducing it to $250,000 where employer's conduct resulted in Plaintiff having trouble sleeping, anxiety, and family suffering).

305 F.3d 18, 20 (1st Cir. 2002). AEELA can prevail on plain error review if it demonstrates that:

> (1) an error was committed; (2) the error was plain (i.e.[,] obvious and clear under current law); (3) the error was prejudicial (i.e.[,] affected substantial rights); and (4) review is needed to prevent a miscarriage of justice, meaning that the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings.

Díaz-Fonseca v. Puerto Rico, 451 F.3d 13, 36 (1st Cir. 2006) (internal quotation marks omitted).

Here, we disagree with AEELA's claim that it properly preserved its challenge to the punitive damages award by filing a timely motion under Rule 59(a). In its new trial and remittitur motion, AEELA did not provide any developed argumentation as to why Monteagudo should not be entitled to punitive damages. Further, AEELA did not cite any cases for its proposition that punitive damages are unwarranted. "[T]heories not raised squarely in the district court cannot be surfaced for the first time on appeal." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991). "This prophylactic rule requires litigants to spell out their legal theories face-up and squarely in the trial court; if a claim is 'merely insinuated' rather than 'actually articulated,' that claim ordinarily is deemed unpreserved for purposes of appellate review." Iverson v. City of Boston, 452 F.3d 94, 102 (1st Cir. 2006) (quoting McCoy, 950 F.2d at 22); see also In re

Olympic Mills Corp., 477 F.3d 1, 17 (1st Cir. 2007) (holding a claim against damages award waived because "as presented to the district court . . . the argument was fatally undeveloped, comprising only four sentences, a citation to a district court opinion, and no analysis whatsoever").

Applying the plain error standard, then, we must first decide whether the district court committed an error. "Title VII authorizes punitive damages when a plaintiff demonstrates that the defendant engaged in intentional discrimination 'with malice or reckless indifference to the federally protected rights of an aggrieved individual.'" Rodríguez-Torres, 399 F.3d at 64 (quoting 42 U.S.C. 1981a(b)(1)). In Kolstad v. American Dental Ass'n., 527 U.S. 526 (1999), the Supreme Court set forth a framework for determining the appropriateness of punitive damages. Following Kolstad, once a plaintiff has shown that "the employer acted with malicious or reckless indifference to the plaintiff's federally protected rights," "she then must establish a basis for imputing liability to the employer." Rodríguez-Torres, 399 F.3d at 64. We have stated that "the plaintiff may meet this burden by showing that the employee who discriminated against her was a managerial agent acting within the scope of his employment." Id. "[E]ven if the plaintiff makes these showings, the employer still may avoid punitive liability by showing that it engaged in good faith efforts to implement an anti-discrimination policy." Id. "Demonstrating good faith compliance is an affirmative defense, and the burden of proof therefore rests with the employer." Id.

Here, a reasonable jury could conclude that Arce was acting in a managerial capacity when engaging in the acts of sexual harassment. Also, as a supervisor, Arce should have been aware that his actions were against AEELA's sexual harassment policy and federal law. A closer question is whether AEELA was entitled to its affirmative defense of good faith compliance, especially in view of the jury's finding that AEELA had satisfied the first prong of its Faragher-Ellerth defense. The question before us then is whether the fact that AEELA had a sexual harassment policy in place that was disseminated to its employees was sufficient to show "good faith compliance" in order to avoid punitive damages.

We have stated that while "a written non-discrimination policy is one indication of an employer's efforts to comply with Title VII. . . . a written statement, without more, is insufficient to insulate an employer from punitive damages liability." Romano v. U-Haul Int'l, 233 F.3d 655, 670 (1st Cir. 2000). From our review of the record, AEELA has not provided sufficient proof that it had in place an "active mechanism for renewing employees' awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials";[13] "testimony by appellants' witnesses that indicated that supervisors were trained to prevent discrimination from occurring;" or "examples

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[13] Notably, Monteagudo testified that she had never been offered a seminar on sexual harassment and that she was unaware if any sexual harassment seminars had been given to her supervisors.

in which their anti-discrimination policies were successfully followed."[14] Id. (providing a non-exhaustive list of ways an employer could demonstrate good faith compliance). While having all of these factors is not necessary to qualify for the defense, see id., AEELA has not provided sufficient evidence that it fulfilled any of these factors. Thus, the district court did not commit plain error in upholding the punitive damages award and denying a new trial on damages.

III. Conclusion

For the foregoing reasons, the district court judgment is affirmed.

Affirmed.

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[14] We acknowledge that AEELA was rebuffed by the district court in its attempt to show how its policy was successfully implemented in 2005. However, as we noted in assessing AEELA's evidentiary claim above, this evidence was not proffered to show that AEELA should not have been liable for punitive damages. Rather, AEELA attempted to introduce Medina's testimony in order to bolster its Faragher-Ellerth defense. This was evidence which the district court was within its discretion to exclude. Even if the district court had considered the 2005 corrective measure AEELA had employed pursuant to its policy, the district court still did not commit plain error in upholding the punitive damages award. This is because AEELA failed to provide sufficient evidence of other indicators of good faith compliance and because the 2005 corrective measure occurred three years after the sexual harassment in this case. See id.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Michelle Monteagudo,

Plaintiff,

Civil No. 03-2357 (GAG)

v.

Asociacion de Empleados del Estado
Libre Asociado de Puerto Rico,

Defendant.

OPINION AND ORDER

This is an action for hostile work environment sexual harassment. The matter is before the court on Defendant's motion for judgment as a matter of law. In this motion, Defendant asks the court to set aside the jury verdict in Plaintiff's favor and enter judgment in Defendant's favor on the ground that it met the burden of proof required under the Faragher/Ellerth defense.[1] After reviewing the pleadings and pertinent law, the court DENIES

1 Defendant also argues that no reasonable jury could have found that Plaintiff was subjected to a severe and pervasive hostile work environment. Because Defendant did not raise this issue in its requests for judgment as a matter of law during trial under Rule 50(a), the court finds that Defendant waived this sufficiency of the evidence challenge. See Casillas-Diaz v. Palau, 463 F.3d 77, 81 (1st Cir. 2006) (noting that "a party cannot use a Rule 50(b) motion as an instrument for introducing a neoteric legal theory - one not distinctly articulated in his end-of-the-evidence motion for judgment as a matter of law - into the case").

Defendant's motion for judgment as a matter of law (Docket No. 125).

I. Relevant Factual and Procedural Background

On December 22, 2003, Plaintiff filed this action, alleging that she was subjected to *quid pro quo* and hostile work environment sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Puerto Rico Laws 17, 69, 100, and 115. See Docket No. 1. On March 31, 2006, the court dismissed Plaintiff's *quid pro quo* sexual harassment claim under Title VII and her retaliation claims under Title VII and Puerto Rico Law 115. See Docket No. 61.

Trial began on May 29, 1007. See Docket No. 107. On two different occasions, at the end of the Plaintiff's case and before the case was submitted to the jury, Defendant requested the entry of judgment as a matter of law on the Faragher/Ellerth defense. The court denied both requests. See Docket No. 109. On June 1, 2007, the jury found that Plaintiff was subjected to sexual harassment in violation of Title VII and Puerto Rico Laws 17, 69, and 100, and awarded Plaintiff money for compensatory and punitive damages. See Docket No. 114. On the same date, the court entered judgment accordingly. See Docket No. 118.

On June 15, 2007, Defendant filed a motion for judgment as a matter of law. See Docket No. 125. Plaintiff opposed Defendant's motion on June 25, 2007. See Docket No. 130. On June 26, 2007, Defendant replied to Plaintiff's opposition. See

Docket No. 131. Plaintiff filed a sur-reply on June 27, 2007. See Docket No. 134.

II. Standard of Review

The court's review of a renewed motion for judgment as a matter of law is very limited. A motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure may be granted only when there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party. See Richards v. Relentless, Inc., 342 F.3d 35, 41 (1st Cir. 2003); Guilloty Perez v. Pierluisi, 339 F.3d 43, 50 (1st Cir. 2003). "A party seeking to overturn a jury verdict faces an uphill battle." See Marcano Rivera v. Turabo Med. Ctr. P'ship, 415 F.3d 162, 168 (1st Cir. 2005). "Courts may only grant a judgment contravening a jury's determination when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Id. (quoting Rivera Castillo v. Autokirey, Inc., 370 F.3d 4, 9 (1st Cir. 2004)). See also Acevedo-Garcia v. Monroig, 351 F.3d 547, 565 (1st Cir. 2003); Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 759-60 (1st Cir. 1994).

A motion for judgment as a matter of law may only may granted if "the evidence together with all reasonable inferences in favor of the verdict, could lead a reasonable person to only one conclusion, namely, that the moving part [is] entitled to judgment." PH Group Ltd. V. Birch, 985 F.2d 649, 653 (1st Cir. 1993). In evaluating the evidence, however, the court "may not assess the credibility of witnesses, evaluate the weight of the evidence or

resolve conflicts in testimony, but must view all facts and reasonable inferences therefrom in the light most favorable to the nonmovant." Davet v. Maccarone, 973 F.2d 22, 28 (1st Cir. 1992).

III. Legal Analysis

Defendant has moved for judgment as a matter of law on the ground that it met the burden of proof required under the Faragher/Ellerth defense. In the Faragher/Ellerth decisions, the Supreme Court devised a special framework for imposing vicarious liability on employers in cases involving harassment by supervisors. Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27, 32 (1st Cir. 2003). The Court wrote identically in both opinions:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, *see* Fed. Rule. Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or

> corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher v. City of Boca Raton, 524 U.S. 807, 808 (1998); Burlington Indus. v. Ellerth, 524 U.S. 764, 756 (1998).

At the close of the evidence in this case, the court instructed the jury on the Faragher/Ellerth defense. See Docket No. 111. Defendant did not object to this instruction. After deliberating for half a

day, the jury found that Defendant approved an anti-sexual harassment policy which was disseminated among the employees, but did not find that Plaintiff unreasonably failed to use the procedures provided in the policy. See Docket No. 114. In this motion for judgment as a matter of law, Defendant claims that no reasonable jury could have found that Plaintiff acted reasonably when she failed to follow Defendant's anti-sexual harassment policy. The court disagrees.

Defendant's anti-sexual harassment policy provides that an employee who feels that she was the victim of sexual harassment should first attempt to discuss the matter with the Human Resources Director. If the Director is the person involved or has some relationship with the harasser, then the employee should discuss the matter with the Executive Director. At trial, Plaintiff testified that her supervisor, Arce, sexually harassed her by repeatedly touching her on the shoulders, asking her out, and on one occasion trying to kiss her. She also testified that Vargas, Defendant's Human Resources Director, was aware of Arce's unlawful behavior and was an active participant in the harassment. Vargas, on another occasion, had threatened to fire Plaintiff if she complained about excessive workload. Finally, Plaintiff testified that Pablo Crespo, Defendant's Executive Director, was friends with Arce and Vargas. Plaintiff's testimony was bolstered by Figueroa Cana, another of Defendant's employee, who said during trial that he had told Plaintiff that she did not have a real opportunity of obtaining relief because of the high ranking officers involved in the harassment and cover up. In light of the above,

the court cannot conclude that no reasonable jury could have found that Plaintiff acted reasonably when she failed to follow Defendant's anti-sexual harassment policy.

IV. Conclusion

For the foregoing reasons, Defendant's motion for judgment as a matter of law (Docket No. 125) is hereby DENIED.

SO ORDERED.

In San Juan, Puerto Rico this 2nd day of August 2007.

S/Gustavo A. Gelpí

GUSTAVO A. GELPI
United States District
Judge

United States Court of Appeals
For the First Circuit

No. 07-2341

MICHELLE MONTEAGUDO

Plaintiff · Appellee

v.

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO

Defendant · Appellant

Before

Lynch, Chief Judge,
Torruella, Baldock,* Boudin,
Lipez, and Howard,
Circuit Judges.

ORDER OF COURT

Entered: February 20, 2009

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk

*Of the Tenth Circuit, sitting by designation.